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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,803	09/30/2004	Ian David Kaehne	A20-068	9636
<div>28156 7590 10/02/2007 COLEMAN SUDOL SAPONE, P.C. 714 COLORADO AVENUE BRIDGE PORT, CT 06605-1601</div>				
			EXAMINER PRATT, HELEN F	
			ART UNIT 1761	PAPER NUMBER
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No. 10/509,803	Applicant(s) KAEHNE, IAN DAVID	
	Examiner Helen F. Pratt	Art Unit 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |  |
|--|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                 | 5) <input type="checkbox"/> Notice of Informal Patent Application                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date ____ | 6) <input type="checkbox"/> Other: ____  |

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 31 and 51 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 31 requires a lithium compound which is "preferable" the sole source of lithium. It is not known whether this source is required or not.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 51 recites the

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broad recitation comprising wines, and the claim also recites including red and white table wines, which is the narrower statement of the range/limitation.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1- 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over "A survey on the composition of mineral water and identification of natural mineral water" (Luk) in view of Someya and Tufley (WO02/00043), Lindon (4,325,975), and Mehansho et al. (7,090,878) and Dyrr et al. (WO 01/52672).

The article "A survey on the composition of mineral water and identification of natural mineral water" (Luk) discloses the comparison of sixty mineral water samples from different sources (abstract). The water can contain the addition of minerals, page

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309, 1<sup>st</sup> para., line 13. The reference discloses all of the required minerals in various amounts. The minerals in groups 3 and 4 are not actually required by the language of claim 1 since zero amounts are listed. The reference to Luk discloses amounts in group 1 and b at within the claimed amounts except for phosphorous (p 311). Claim 1 differs from the reference in the use of phosphorous in the mineral waters. However, Someya discloses that it is known to make a beverage from coral sand, which contains phosphorous (Table 1, 6<sup>th</sup> item). Also, the other minerals are disclosed by Someya. Tuffley discloses a beverage which contains a supplement of minerals in particular amounts of 50 Mg/l of calcium, 45 mg of phosphorous, and manganese glycinate, magnesium glycinate in amounts of from 75 mg. and in amounts of 2.5 mg/l, magnesium in amounts of 5 mg (page 9). Mehansho et al. disclose a mineral fortified water composition containing calcium, iron, zinc, copper, manganese iodine, magnesium (abstract). Lindon discloses a mineralized drinking water continuing strontium, magnesium, calcium and lithium (abstract). The particular amounts are seen as being within the skill of the ordinary worker. Dyrr et al. disclose that 37 elements can be found in water and 24 are essential for proper nutrition and health (page 7, lines 10-30). The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a water product containing minerals, properties such as taste and nutrition are important. It appears that the precise ingredients as well as their proportions affect the taste and nutrition of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.

As to the other minerals, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Each ingredient is used for its known function. Nothing has been shown as to a coaction of ingredients that produce anything new or unexpected. Adding particular amounts of ingredients to make a beverage taste good is within the skill of the ordinary worker as this is a method of trial and error. Therefore, it would have been obvious to make a beverage containing known minerals in particular amounts as shown by the combined references.

Claim 2 further requires a particular pH for still water, aerated or carbonated water. The pH of pure water is 7. Claim 41 requires that the water is still water with a pH of 7.2 to 7.6. The reference to Mehansho et al. disclose the use of a fortified water.

with minerals to be between 4 and 9.5. Ph's of course can easily be adjusted with acids and bases. Therefore, it would have been obvious to adjust the ph to a required level.

Claims 2 and 42 further require the addition of carbon dioxide. The addition of carbon dioxide to water is old and nothing new is seen in bubbly water. Therefore, it would have been obvious to add a known gas to water for its known function.

Claims 3-12 further require particular concentration of minerals, and claims 13-40 that the minerals come from particular sources. However, these sources are well known and nothing new is seen in their use. It would have been within the skill of the ordinary worker to use food safe sources of minerals. Applicants have not made any claim that they have discovered these particular sources of minerals. Therefore, it would have been obvious to use known food safe sources of minerals to make the claimed composition.

Claims 47-48 further require making concentrated preparations of the various groups and adding them to water in particular amounts. However, method limitations are not given weight in a composition claim. Nothing new is seen in the concentration of water which merely requires boiling away particular amounts of water or the use of less water. Certainly, the use of concentrated solutions is more feasible, than large quantities of water. Therefore, it would have been obvious to make concentrated solutions of minerals.

Flavoring compounds and coloring compounds in beverages are so old that they hardly need a reference as in claims 49 and 50 and 51. Therefore, it would have been obvious to use known flavorants in beverages.

Claim 52 further requires that mineral water is used in place of other water in the manufacture of beer. However, manufacturing beer is considered to be a method. Minerals are generally contained in water, however, the claims require particular amounts of minerals. Certainly, if it would have been obvious to make an acceptable tasting and nutritive mineral water as above, this water would have been suitable for beer making absent a showing to the contrary. The amounts of minerals in the claimed waters are in such small amounts that they are not readily tasted. Therefore, it would have been obvious to use mineralized water in place of known water that contains minerals when making beer.

Claims 53-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1-52 above, and further in view of Jakubowicz (DE19700368).

Claims 53-54 further require adjusting the pH's with organic acids particularly citric and tartaric. Citric acid is extremely well known in beverages and nothing new is seen in its use. Jakubowicz discloses that it is known to use citric acid in beverages (abstract). Therefore, it would have been obvious to add known acids to adjust the pH of beverages as that is the function of an acid.

Claims 55 and 56 further require adding the claimed mineral water to a beverage in particular amounts or to use a concentrate of the mineral water. However, dilution of beverages is very well known as in diluting a concentrate such as orange juice or dried beverage compositions. Jakubowicz discloses adding a concentrated divalent ion salt/citric acid mixture solution to drink ingredients. The particular concentration is seen



to have been within the skill of the ordinary worker. Therefore, it would have been obvious to add concentrated mineral solutions to dilute beverages to any concentration.

Nothing new is seen as in claim 58 of adding concentrated mineral waters to dilute a beverage, as the beverage will be diluted no matter the type of water. As above it is known to mineralize water. Nothing new is concentrating a mineral solution. Therefore, it would have been obvious to dilute a beverage as in claims 58 and 59.

Claims 52, 60 and 61 further require diluting beer and other alcoholic beverages and tea. Mehansho et al. disclose that it is known to flavor water with botanic flavors and tea and hops. No patentable distinction is seen in flavoring water or in diluting a flavorant. Therefore, it would have been obvious to dilute a flavored beverage with water.

#### ***Election/Restrictions***

Applicant's election with traverse of claims 1-42, 47-61 in the reply filed on 9-27-07 is acknowledged. The traversal is on the ground(s) that there is no serious burden on the Examiner to search all the claims. This is not found persuasive because the method requires different limitations than the composition claims. Certainly, if such a method had been found when searching the composition claims it would have been applied.

The requirement is still deemed proper and is therefore made FINAL.

This application contains claims 43-46 drawn to an invention nonelected with traverse in Paper No. dated 8-27-07. A complete reply to the final rejection must

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include cancellation of nonelected claims or other appropriate action (37 CFR 1.144)


See MPEP § 821.01.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Keith Hendricks, can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 9-27-07

  
HELEN PRATT  
PRIMARY EXAMINER